STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2003-629

November 25, 2003

MAINE PUBLIC UTITLIES COMMISSION
Investigations into Implementation of the Federal Communication Commission's Triennial Review Order

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **December 9, 2003**. It is expected that the Commission will consider this report at its deliberative session on **December 15, 2003**.

I. SUMMARY

In this Order, we decline the request of InfoHighway Communications Corporation (IHCC) to conduct a 90-day proceeding.

II. BACKGROUND

On August 21, 2003, the Federal Communications Commission (FCC) issued its *Triennial Review Order* (TRO)[1] relating to the implementation of the Telecommunications Act of 1996. One of the issues addressed in the TRO was whether incumbent local exchange carriers (ILECs) needed to continue to provide unbundled switching to competitive local exchange carriers (CLECs) who use the switching unbundled network element (UNE) to provide service to

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (rel. August 21, 2003) (*Triennial Review Order or TRO)*.

enterprise market customers.[2] The FCC instituted a national presumption that ILECs do not need to provide unbundled switching to CLECs serving enterprise market customers using DS-1 and higher speed loops. The FCC then established a mechanism by which a state commission can petition the FCC for a waiver of this presumption if the state commission finds that circumstances in specific markets warrant continued provision of the enterprise market switching UNE to CLECs serving DS1 and DSO customers.[3] In order to obtain a waiver from the FCC, the state must conduct a detailed analysis of operational and economic issues and file the waiver petition within 90 days of the effective date of the *Triennial Review Order* (January 1, 2004). This process is known as conducting a 90-day proceeding.

On September 25, 2003, the Commission issued a Procedural Order stating that it did not plan to conduct a 90-day proceeding and seek a waiver of the national presumption unless affected CLECs could make a *prima facia* showing that they can rebut the FCC's national presumption. We set a deadline of October 8, 2003, for such filings and specified that they must include a detailed offer of proof addressing the specific factors outlined by the FCC at ¶¶ 456-458 of the TRO.

On October 9, 2003, IHCC notified the Commission that an order by the Second Circuit Court of Appeals had stayed state commission proceedings. On

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[2]Enterprise customers are defined as those who depend upon their telecommunications network to do business, who are sensitive to reliability and service quality issues, and who may demand sensitive, sophisticated packages of services. See TRO at ¶¶128,129.

[3]TRO at ¶ 455.

October 15, 2003, the Hearing Examiner issued a Procedural Order stating that the Second Circuit's Order did not stay the CLEC's obligation to file their Offers of Proof with the Commission and set an extended deadline of October 21, 2003. On October 20, 2003, IHCC filed its Offer of Proof. On October 31, 2003, Verizon filed its Response and on November 1, 2003, Cornerstone filed its Objections. In early November, the Second Circuit lifted its temporary stay.

III. LEGAL STANDARDS

The FCC's TRO set the regulatory framework for examining a request by a carrier that a state commission seek a waiver of the finding of non-impairment for enterprise switching. The TRO establishes a national presumption that CLECs are not impaired without access to such switching but permits state commissions to rebut the presumption by conducting a more granular analysis using economic and operational criteria detailed by the FCC. TRO ¶¶ 451, 455.

The FCC stated that a carrier is impaired when lack of access to a specific unbundled network element (UNE) "poses a barrier or barriers to entry… that are likely to make entry into a market uneconomic." TRO at ¶ 84. When conducting their granular analysis, state commissions must examine operational and economic factors, including: (1) ILEC performance in provisioning loops; (2) difficulties associated with obtaining collocation space due to lack of space or delays in provisioning; (3) difficulties associated with obtaining cross-connects in ILEC wire centers; (4) the cost of entry into a particular market; (5) CLECs' potential revenues from serving enterprise customers in that market; and (6) the prices CLECs are likely to be able to charge in that market. 47 C.F.R. 51.319(d)(3)(i)(A,B), TRO at ¶ 451-458.

IV. PARTIES' POSITIONS

A. IHCC

IHCC requested three types of relief from the Commission. First, it requested that the Commission find that it is operationally impaired without access to Verizon's switching UNE. IHCC supports this request by asserting that Verizon has not defined any process for accomplishing a seamless, non-disruptive transfer of IHCC customers to alternate switching arrangements and that Verizon has interrupted service on IHCC's DS-1 circuits during installation and repairs. IHCC argues that, given the "substantial revenues" from its circuits in Maine, it is essential that service not be disrupted during the transition away from UNE-P service. IHCC did not provide any additional information concerning the nature of its customer base in Maine.

IHCC alleges that in order to migrate customers away from Verizon's UNE-P service to other facilities, a complex process requiring close coordination is necessary. IHCC argues that Verizon's failure to begin establishing such a process, despite repeated requests to do so, ensures that migration will be extremely disruptive and devastating to IHCC customers. These customers will then chose to switch to Verizon rather than endure the disruption because Verizon can convert the customers back to Verizon retail by a cost-free and disruption-free billing record change. Thus, ICHH believes it is impaired without access to Verizon's UNE-P for DS-1 circuits.

IHCC further argues that the Commission can and should look beyond the factors established by the FCC in the TRO and that the FCC's assumptions regarding the ease of transition away from UNE-P for DS-1 circuits was not, and is not, supported by the facts. IHCC does not identify any specific geographic areas where impairment exists. Instead it claims that "many" areas in Maine are impaired from providing DS-1 enterprise service in the absence of unbundled switching. IHCC also argues that it cannot provide data for specific customer and geographic markets for this 90-day docket because the FCC's TRO calls for relevant market definitions to be established in the 9-month docket relating to mass market provisioning. This internal inconsistency within the TRO, according to IHCC, makes for an impossible burden of proof. Therefore, as its second form of relief, IHCC requests that the Commission seek an extension of time from the FCC to pursue the investigation of enterprise switching impairment in particular geographic areas.

Finally, IHCC argues that, if the Commission determines not to pursue a waiver of the no-impairment presumption, it should order Verizon to keep current rates in place for unbundled local switching provided pursuant to Section 271 of the TelAct until a rate case can be completed. IHCC argues that Verizon's current TELRIC rates in Maine, or a price close to them, are likely to be found "just and reasonable" for purposes of Verizon's continuing 271 obligations.

B. Verizon

Verizon argues that IHCC has not made the necessary showing under the FCC's TRO standards to support a finding of impairment by the Commission and application for a waiver to the FCC. Specifically, Verizon states that IHCC has not made a claim that specific operational factors are impairing IHCC from deploying its own switches for use in the enterprise customer market, as is required by the TRO. Verizon argues that merely alleging difficulties in provisioning UNE-P arrangements does not address the material issues, namely any evidence of problems associated with Verizon's provisioning of stand-alone loops for use with CLEC switches, which IHCC did not provide.

Verizon claims that a hot-cut process is not necessary for migration of enterprise customers. According to Verizon, the FCC has found that the conversion process will involve keeping the incumbent's service in place while the service to the new digital loop is initiated. TRO at ¶ 451. Thus, there should not be any disruptions.

Verizon also argues that IHCC has not provided any economic data to support its position and thus has failed to make the requisite factual showing that entry into a particular market is uneconomic in the absence of the switching UNE. Verizon contends that even if IHCC were to lose all of its existing customers, IHCC would not be impaired in the sense intended by the TRO.

Verizon rebuts IHCC's argument that relevant markets cannot be determined at this time. According to Verizon, an appeal of the TRO is the appropriate venue for challenging that order's internal inconsistency. Verizon states that in order to provide IHCC with the relief it seeks, the Commission would have to ask the FCC to reconsider its order rather than request a waiver of the national presumption.

With regard to IHCC's request that the Commission order Verizon to retain current rates for switching until after a rate case, Verizon argues that the FCC has given states no role in pricing network elements required pursuant to Section 271. Verizon contends that, pursuant to Paragraph 664 of the TRO, TELRIC pricing is not required for elements that have been removed from the list of Section 251 UNEs and that the FCC has specific and exclusive enforcement authority under Section 271(d)(6).

C. Cornerstone

Cornerstone's comments were limited to the Section 271 pricing issues raised by IHCC and Verizon. Cornerstone argues that questions regarding the appropriate pricing standard to be applied to Verizon's Section 271 unbundling obligations should not be addressed without opportunity for all CLECs to fully participate in consideration of the issue. Cornerstone points out that the Commission's request for comments from the parties addressed only the threshold issue of whether to conduct a 90-day proceeding and not all collateral issues associated with the TRO, such as the Section 271 pricing issue.

IV. DECISION

We find that IHCC's Offer of Proof does not establish a *prima facie* case rebutting the FCC's national presumption of non-impairment for enterprise switching. In neither the Offer of Proof nor the Reply to Verizon's Response did IHCC provide specific information regarding the operational and economic barriers described by the FCC. IHCC made broad claims of likely impairment in "substantial" areas of Maine without backing those claims with any specific data. In addition, it does not appear that IHCC would be able to provide any specific data within the FCC's 90-day timeframe. Thus, we decline to further investigate the appropriateness of seeking a waiver from the FCC on their finding of non-impairment in the enterprise switching market in Maine. We also decline to request permission from the FCC for a waiver of the 90-day schedule to investigate these issues. Indeed, we agree with Verizon that the more appropriate mechanism for the relief sought by IHCC is a Motion for Reconsideration to the FCC and the time for such motions has expired.

The real focus of IHCC's filings is IHCC's claimed inability to transition customers from UNE-P service to other facilities. Without reaching a conclusion regarding the substantive merit of IHCC's claims regarding difficulty with transition issues, we direct IHCC's attention to the Commission's Rapid Response Process to address any specific operational issues that arise when IHCC begins to transition its customers off of Verizon's UNE-P services. Given the minimal number of IHCC lines in Maine, we believe the Rapid Response Process is the appropriate forum to address IHCC's issues.[4]

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[4]IHCC informed the Commission (and any parties who signed the Commission's Protective Order agreement) of the number of DS-1 circuits it has in Maine. Without revealing the specific number involved, we note that the number of circuits is minimal.

With regard to the Section 271 pricing issues raised by IHCC, and addressed by Verizon and Cornerstone, we agree with Cornerstone that this Order is not the appropriate vehicle for addressing those issues. We expect that 271 pricing issues may be raised and then addressed in other proceedings. Specifically, to the extent that a CLEC and Verizon cannot reach agreement during their interconnection agreement negotiations regarding Section 271 pricing issues, the Commission may be asked to act as a mediator pursuant to Section 252(a)(2) of the TelAct or to arbitrate the dispute pursuant to Section 252(b)(1). It is also possible that Section 271 pricing issues will be raised in both the Dark Fiber (Docket No. 2002-243) and Wholesale Tariff (Docket No. 2002-682) proceedings as Verizon modifies its tariffs to reflect the decisions reached in the TRO. We will wait until these issues are ripe for decision before we reach any determination regarding our authority to address pricing issues associated with Verizon's continuing obligation under Section 271 to offer certain UNEs at "just and reasonable" rates.

Respectfully submitted,

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Trina M. Bragdon
Hearing Examiner